JOHN A. PAINE

IBLA 75-428 Decided July 29, 1982

Reconsideration of the Board decision styled John A. Paine, 22 IBLA 56 (1975), affirming the decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA 7717.

Petition for reconsideration granted; John A. Paine, 22 IBLA 56 (1975), and decision appealed from vacated; case remanded.

1. Alaska: Native Allotments

> In sec. 905(a) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), Congress provided that all Native allotment applications which were pending before the Department on Dec. 18, 1971, which describe either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve--Alaska, are approved on the 180th day following the effective date of that Act subject to valid existing rights, unless otherwise provided by other paragraphs or subsections of that section. Failure to provide adequate evidence of use and occupancy does not bar approval of an allotment application under that provision. Where such an application has been rejected, the case will be remanded to the Alaska State Office to be held for approval pursuant to sec. 905 of the Alaska National Interest Lands Conservation Act, subject to the filing of a protest before the end of the 180-day period.

APPEARANCES: Lucy M. Lowden, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

John A. Paine has petitioned the Board for reconsideration of our decision in John A. Paine, 22 IBLA 56 (1975). By that decision the Board affirmed the rejection of his Native allotment application, AA-7717, because he did not present adequate evidence of 5 years of substantially continuous use and occupancy of the land prior to December 18, 1971, the date of repeal of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed 43 U.S.C. § 1617 (1976). Appellant did not receive an opportunity for a hearing. In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the court held that Native allotment applicants were entitled to notice and an opportunity for a hearing where there was an issue of fact regarding an applicant's qualifications.

[1] At the present time, however, we must consider the following provision of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435, enacted on December 2, 1980:

> Sec. 905. (a)(1) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor.

The other paragraphs cited describe circumstances under which the application would remain subject to adjudication under the Native Allotment Act, supra. In this case, it appears that the only circumstance that would bar automatic approval would be the filing of a protest under subsection 905(a)(5), before the end of the 180-day period.

The record shows no reason why appellant's allotment application should not be approved under this statutory provision. There appear to be no valid existing rights in conflict with the application, and the land was not reserved on December 13, 1968. We have no basis for concluding that appellant's application was not pending before the Department on December 18, 1971. Where a Native allotment applicant meets the requirements of subsection 905(a)(1), failure to provide adequate evidence of use and occupancy does not bar approval of the allotment application. The State Office, therefore, should hold appellant's application for approval, subject to any action which may have arisen before the end of the 180-day period which would preclude approval under subsection 905(a)(1) and require adjudication pursuant

to the provision of the Native Allotment Act. Warner Bergman (On Reconsideration), 60 IBLA 214 (1981); Jack Gosuk (On Reconsideration), 54 IBLA 306 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decision in John A. Paine, supra, is vacated and the case is remanded for further action consistent with this opinion.

Gail M. Frazier
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge